87-1934 (2)

No._____

Supreme Court, U.S.
FILED
MAY 9 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

Ann Dore McLaughlin, Secretary
of Labor, United States Department
of Labor,
Respondent,

vs.

Glassboro Service Association, Inc.,
Petitioner

On Petition for a Writ of Certiorari
to the
United States Court of Appeals
for the Third Circuit

Appendix to Petition for Writ of Certiorari

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[Statement of Case]

Gerry, J:. Plaintiff here charges the defendant with violating the provisions of Section 16 and 15(a)(2) of the Fair Labor Standards Act by paying its employees who are engaged in commerce or in the production of goods for commerce or who are employed in an enterprise engaged in commerce or in the production of goods for commerce at rates less than the minimum wage prescribed by the Act. Glassboro Services Association, Inc. is a New Jersey corporation which consists of 299 member farms throughout the eastern and southeastern state. Its purpose is to arrange for the hire of Puerto Rican migrant farmers for its member farms. Pursuant to this purpose Glassboro renegotiated for its members in

agreement with the Commonwealth of Puerto Rico.

Apparently this agreement between Glassboro and the Commonwealth provides that Glassboro will loan the cost of air fare for transportation to the member farms to the migrant workers. The workers repay Glassboro according to a schedule set in the agreement. If the workers complete his term of hire with Glassboro, Glassboro gives him, one, the cost of air fare paid back by the worker already to the member farm and two, a ticket home to Puerto Rico or its cash equivalent. However, if the worker doesn't complete his term of hire, he winds up having to pay for his air fare to the farm; Glassboro never reimburses him. In the latter case, the loan repayments sometimes have the effect of bringing the employee's weekly wage below the Federal minimum wage.

The plaintiff only addresses itself to this latter situation and claims that the practice of deducting loan repayments from wages is a violation of the Fair Labor Standards Act insofar as it results in employees receiving less than the minimum wage. The defendant doesn't seem to contest this question of law insofar as my ability is concerned, but argues that other benefits Glassboro's member farms provide to the employees should be included in computation of the minimum wage and, in any case, only nominal damages should be awarded. Glassboro also contests the Labor Department's manner of computing minimum wage deficiencies. The plaintiff in reply, contends that as a matter of law the other benefits cannot be included in the computations. Plaintiff also argues that this is not a proper case for the award of nominal damages.

In the instant case, the parties seem to agree that the defendant deducted the cost of air fare from the wages of its employees and that, if certain other benefits were not considered, such deductions resulted in the employee earning less than the applicable Federal minimum wage.

This Court is faced with two initial legal issues. One, whether the Fair Labor Standards Act and the regulations issued thereunder, prohibit the deductions from an employee's wages of transportation costs to and from the point of hire, which deduction reduces the wages of the employee below the minimum wage required by this Act.

Second issue whether the Fair Labor Standards Act and the regulations issued thereunder allow an employee to offset benefits provided in the form of housing and utilities against the minimum

required to be paid to employees where the collective bargaining agreement states that such benefits are to be provided "at no cost to the worker."

[FLSA Provisions, Interpretations]

Section 6 of the Act provides for the period involved in this litigation, 1975 through 1977 as follows with respect to the statutory minimum wages to be paid all agricultural employees, and I quote:

> Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, wages at the following rates and thereafter the wage rates are stated for various periods.

Section 3(m) sets forth the statutory definition of wage and provides in parts that seem to me that are applicable and pertinent here, "wage paid to any employee includes the reasonable cost as determined by the Secretary of Lábor, to the employer of furnishing such employee with board,

lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees provided that the cost of board, lodging or other facilities shall not be included as a part of the wage paid to any employee to the extent it is included therefrom under the terms of a bona fide collective-bargaining agreement applicable to the particular employee."

Thus, reading Sections 6 and 3(m) together the minimum wage must be paid in cash except insofar as payment of wages in board, lodging or other facilities is permitted by the Act. This interpretation is under 29 CFR Section 531.27(a). Moreover, 29 USC Section 211 authorizes the Wage and Hour Administration to administer and enforce the Act and his or her interpretations of the Act are entitled to great weight by the Court. The main issue here is

whether the transportation charges assessed by the defendant on its agricultural employees can be included int he computations of the employees' minimum wages as the cost of furnishing "facilities"--and that word is used in the Act--to the employee.

29 CFR 531.3(d) sets forth the relevant test for determining whether the furnishing of facilities can be included in the computation of the employees' wages: whether the furnished facility is primarily for the benefit or convenience of the employer. In 29 CFR Section 531.32(c) the Administration charges are to be considered primarily for the employer's benefit where such transportation is an incident of that employment.

[Transportation Cost as Wages]

Keeping in mind the weight and consideration this Court is required to

give to the Administration's interpretation of the Act, the Court notes that on previous occasions the Wage-Hour Administration has ruled that transportation expenses from the point of hire to the work site could not be considered in the determination of whether a minimum wage has been paid because such transportation was an incident of the employer's recruitment program. Opinion letter of Wage-Hour Administration Number 1139 (WH-92) December 10, 1970 and March, 1969 to June, 1973 CCH Labor law Reporter Transfer Binder, Wage-Hour Administration ruling Section 30,709. And that the cost of transportation to and from a work site was normally regarded as part of the employer's recruitment cost and could not be deducted from the employees' wages if the result would be to reduce the wages below the minimum wage required by

the Act. In the instant case, the defendant has not challenged the reasoning of the Administration in the above cited cases.

This Court finds that the cost of transporting workers to the point of hire cannot properly be included in the computations of the employees' minimum wages as the cost of furnishing facilities to the employees and that is permitted otherwise under the Act.

[Housing and Utilities as Wages]

The defendant urges the Court to allow it to offset benefits provided to employees in the form of housing and utilities against the minimum wage required to be paid to employees. Section 3(m) of the Act clearly allows such an offset subject to the proviso, and I quote:

> Again, provided that the cost of board lodging or other facilities shall not be included as part of the wage paid

> to any employee to the extent it is excluded therefrom under the terms of a bona fide collective bargaining agreement applicable to the particular employee.

In the present case it is undisputed that the contract negotiated by the Commonwealth of Puerto Rico and the defendant is in the nature of a collective bargaining agreement as it governs the hours, wages, terms and conditions of employment of the Puerto Rican migrant employee workers brought by the defendant to work in the northeast. The question this is whether those "facilities" are excluded from the wages paid to the employees under that agreement.

The agreement at issue in Article 8 provides that the defendant is to provide lodging at no cost to the workers and either meals to be paid for by the worker or at the rate of $3.40 or $3.50 per day or cooking and eating

facilities at no cost to the worker. The defendants would have the Court now allow the defendants to offset the cost of such facilities against the minimum wage due the employees even though the defendant previously agreed to furnish these facilities at no cost to the worker.

In an analogous case the Wage-Hour Administration stated that such phrases as "fee of cost, without charge" and "free of charge" are construed to mean excluded from wages under an agreement which specified that meals would be furnished free of charge and the employer could not take a wage credit for items excluded from wages. The reasoning of the Wage-Hour Administration is persuasive. To allow the employer a wage credit for facilities excluded from wages and to allow this credit is to result in the employee receiving less than the

minimum wage would necessarily violate the terms of Section 3(m) which forbids the inclusion as part of the minimum wage paid to any employee, the cost of board, lodging or other facilities which have been, as here, excluded from wages under the terms of a collective bargaining agreement.

The Court finds, therefore, that the defendant cannot offset the value of the benefits provided in the form of housing and utilities against the wage required to be paid its employees if such offset would result in the employee receiving in cash less than the minimum wage.

[Nominal Damages Caused]

Finally, the defendant urges this Court to award only nominal damages for its violation of this Act. the defendant cites one unreported case from the Cumberland County district Court in

support of this proposition. That case apparently was a breach of contract case in which the plaintiff was a migrant worker. The policies underlying the Fair Labor Standards Act were not considered in that case and thus the analogy between that case and this one at bar appears somewhat strained.

In the instant case the defendant argues that to restrain the withholding of wages to its employees would amount to a penalty or an unjust enrichment. However, in order for the defendant to release the wages earned by its employees simply restores to the employees that to which they were rightfully entitled. In fact, the defendant it would seem would be unjustly enriched if it were allowed to retain improperly those portions of the employees' wages that have been retained. However, it appears to the Court that the parties disagree as to the

amount of damages and the proper method to calculate such damages and the records from which such damages should be calculated, as Mr. Jacob pointed out.

Therefore, the Court grants partial summary judgment for the plaintiff as to the illegalities of defendant's practice of deducting from employees' wages, transportation costs to and from the point of hire, which deduction reduces the wages of the employee below the minimum wage required to be paid by the Act.

Further, the Court finds as a matter of law that the defendant is not entitled to an offset for the "facilities", that is, lodging and utilities provided to its employees because such benefits were to be excluded from the wages under the agreement between the defendant and the Commonwealth of Puerto Rico.

The Court' feels that there is no genuine issue as to material fact and that the plaintiff is entitled to this remedy as a matter of law. Finally, because there are issues of fact to be resolved with respect to the extent of damages and the entitlement thereto, the Court denies summary judgment on the issues of damages and it will be reserved for resolution at the appropriate time by the trier of facts.

November 5, 1981 Consent Amendatory Order, United States District Court, District of New Jersey, Granting Summary judgment to respondent.

RAYMOND J. DONOVAN, Secretary of Labor, United States Department of Labor,
Plaintiff

vs.

GLASSBORO SERVICE ASSOCIATION, INC.,
Defendant.

Civil Action File No.: 78-0377
(Gerry, J.)

Consent Amendatory Order

Plaintiff having filed a Petition for Prosecution of Defendant, Glassboro Service Association, Inc., for Civil Contempt of Court, having filed a Motion to Hold Defendant in Civil Contempt of this Court by reason of its failure and refusal to obey the Order of this Court granting Plaintiff partial summary judgment entered on December 4, 1979 and filed on December 5, 1979, and the parties having appeared before the Court on October 16, 1981, and having consented to the entry of this consent Amendatory

Order nunc pro tunc to and including the date of the Order granting Plaintiff partial summary judgment entered on December 4, 1979 and filed on December 5, 1979, and the Plaintiff having hereby withdrawn his Petition for Prosecution of Defendant for Civil Contempt and his Motion to Hold Defendant in Civil Contempt without prejudice to renew, the Court's Order granting Plaintiff partial summary judgment is hereby amended to read as follows:

ORDERED, ADJUDGED AND DECREED that defendant, its member farmers, their agents, servants, employees, and those persons in active concert or participation with them are permanently enjoined and restrained nunc pro tunc to and including the date of the Order granting plaintiff partial summary judgment entered on December 4, 1979 and filed on December 5, 1979 from violating

Sections 6 and 15(a)(2) of the Fair Labor Standards Act of 1938, as amended [52 Stat. 1060; 29 U.S.C. 219 et seq. (hereinafter, "the Act")] in any of the following manners:

(1) (Glassboro shall not) (sic--faulty photocopy received from Clerk) pay its employees who are engaged in commerce or in the production of goods for commerce, or who are employed in an enterprise engaged in commerce or in the production of goods for commerce, within the meaning of the Act as aforesaid, at rates less than the minimum wage prescribed therein;

(2) Defendant shall not deduct the cost of transporting workers from the point of recruitment to the point of hire from the minimum wages due its employees under the Act. Defendant shall not include the computations of its employees' minimum wages, as the cost of furnishing facilities to its employees, the cost of

transporting workers from the point of recruitment to the point of hire;

(3) Defendant shall not offset the value of the benefits provided by it pursuant to its contract with its employees in the form of housing, utilities and meals against the minimum wage required to be paid to its employees if such offset would result in the employee receiving in cash less than the minimum wage prescribed by the Act;

(4) Defendant shall not fail to comply with the provisions of 29 Code of Federal Regulations Part 531.35 which provides that "[w]hether in cash or in facilities, 'wages' cannot be considered to have been paid by the employer unless they are paid finally and unconditionally or 'free and clear.' The wage requirements of the Act will not be met where the employee 'kicks-back' directly or indirectly to the employer or to another person for the

employer's benefit the whole or part of the wage delivered to the employee. This is true whether the 'kick-back' is made in cash or in other than cash...."

(5) Defendant shall not advance transportation costs to its employees for transportation from their point of recruitment to their point of hire and then seek to secure a voluntary repayment, "payback" or "kick-back" to it by these employees where the result is to bring such employees below the minimum wage prescribed by the Act for the workweeks in question;

(6) Defendant shall not apply any outstanding wage checks due to its employees to any transportation cost indebtedness where the result is to bring such employees below the minimum wage prescribed by the Act for the workweeks in question.

Dated: November 4, 1981

/s/John F. Gerry
United States District Judge

The undersigned attorneys hereby consent to the entry of this Order.

T. Timothy Ryan, Jr.,
Solicitor of Labor

Francis V. LaRuffa
Regional Solicitor
By: /s/Manuel delValle
Attorney U. S. Department of Labor

Attorney for Defendant
Glassboro Services Assoc., Inc.
/s/Frederick A. Jacob, Esq.

August 25, 1983 Letter Opinion of John F. Gerry, District of New Jersey, to counsel for petitioner and respondent

RE: Ray Marshall, Secretary of Labor
vs. Glassboro Service Association, Inc. - Civil Action No. 78-377

Dear Counsel:

The Labor Department filed its complaint in the instant case on or about February 1978, alleging a pattern or practice by defendant of violations of the minimum wage standards of the Fair Labor Standards Act, 29 U.S.C. 201 et seq.

On December 5, 1979, this court granted plaintiff's motion for partial summary judgment on the question of liability. Specifically, the court ruled that deductions from migrant farmworkers' wages to recompense the employer for the workers' transportation costs violated the Fair Labor Standards Act (FLSA) to the extent that such deductions

effectively lowered wages below the federally-mandated minimum wage. The Third Circuit Court of Appeals thereafter affirmed. Marshall v. Glassboro Service Ass'n., 639 F.2d 774 (3d Cir. 1979) (J.O.). The court enjoined such deductions.

In October 1981, the Government applied to the court for an order holding defendant in contempt of the court's December 1979 ruling. According to the Department of Labor, Glassboro had implemented a system of so-called voluntary paybacks for plane fare under which workers who failed to complete their contracts either paid over, or suffered wage deductions for, the amount of their plane fare.

In November 1981, the parties agreed to a "consent amendatory order" prohibiting, inter alia, Glassboro from implementing or continuing the voluntary

payback scheme. The order applied nunc pro tunc to December 5, 1979, the date of the court's order granting the Government summary judgment on the liability question. Thus, the consent amendatory order effectively established defendant's liability during the calendar years 1980 and 1981 for unpaid minimum wages arising from workers' payment of their air fares.

Since entry of the consent decree, the parties have undertaken, with gratifying cooperativeness, extensive discovery to determine the amount of underpayments to Glassboro workers. Those underpayments principally, if not wholly, arose from assessment of airplane fares against the workers' wages.

In the process of discovery, the Government claims to have uncovered an additional set of "transportation" deductions imposed upon the workers in the years 1980-1981 -- the cost of bus

fare from one or another airport to the Glassboro labor camp. The Government now seeks an order holding the imposition of such costs violative of the consent decree.

In addition, the Government petitions for an award of prejudgment interest upon the judgment for damages the court will presently enter.

Bus-(Ground Transportation) Fare.

According to the Government, Glassboro and its member-growers during the calendar years 1980 and 1981 required that their migrant workers pay Glassboro for bus fare from their point of arrival to the Glassboro camp. The Government moves that the court hold these deductions violative of the Consent Amendatory Order entered November 4, 1981.

According to Glassboro, the relevant portions of the consent order

provide as follows:

> (5) Defendant shall not advance transportation costs to its employees for transportation from their point of recruitment to their point of hire and then seek to secure a voluntary repayment, "payback" or "kick-back" to it by these employees where the result is to bring such employees below the minimum wage prescribed by the Act for the workweeks in question;
>
> (6) Defendant shall not apply any outstanding wage checks due to its employees to any transportation cost indebtedness where the result is to bring such employees below the minimum wage prescribed by the Act for the workweeks in question.

According to defendant, Glassboro secured payment from the migrant workers for bus fare from one or another airport to the Glassboro camp principally by exacting payment before the workers boarded the bus. Some workers, defendant admits, did not pay the fare until they disembarked at the Glassboro camp. An exceptional few did not pay at all, and

these suffered deductions from their pay by the farmer-members of the Glassboro Service Association.

Defendant concedes that deductions for bus fare assessed after the worker was assigned to a farm would and did violate the consent decree, paragraphs 5 and 6. Defendant further specifies that Glassboro has already included these deductions in its calculation of already established liability. But defendant argues that bus fare payments by workers before assignment to a particular farm do not violate paragraphs 5 and 6, because the migrant worker's payment is made before he begins working. As such, it cannot constitute a deduction from wages, since the worker has earned no wages at the time he makes the payment.

Defendant's argument focuses solely upon paragraphs 5 and 6 of the decree. That focus ignores the breadth of the

terms of the decree, and substitutes artificial distinctions for a practical view of the economic realities of the worker-contractor relationship.

Neither plaintiff nor defendant have emphasized a subparagraph (2) of the November 1981 consent decree. That paragraph forbids defendant to "deduct the cost of transporting workers from the point of recruitment to the point of hire from the minimum wages due its employees under the Act".

Perhaps more important, the decree continues in the following manner:

> Defendant shall not include in the computations of its employees' minimum wages, as the cost of furnishing facilities to its employees, the cost of transporting workers from the point of recruitment to the point of hire.

Consent Amendatory Order, subparagraph (2).

Regardless of when the worker pays for his fare, the court thinks that the

quoted portion of the consent order places the burden of that cost upon the employer. The decree forbids the employer from including transportation costs from the point of recruitment--here Puerto Rico -- to the point of hire -- the farm -- as a part of the employer's minimum wage payment to the worker. But to pay workers the minimum wage, and at the same time to require them to pay their bus fare from the airport to the camp, effectively does render the cost of transport a part of the wage payment.

Thus, the court holds that to the extent that a worker's payment of his ground transportation reduced the amount of money he ultimately earned below the minimum wage, that payment violated the consent amendatory order of November 4, 1981.

The parties have submitted this

matter on the papers, consenting to the court's adjudication without a hearing.

The Government's damages figures are based in part upon a finding that the payment of bus transportation fares by the workers violated the decree -- the defendant's figures are premised on the absence of a violation.

Therefore, the court will accept the Government's figures and enter judgment in that amount.

Interest.

The FLSA does not explicitly authorize the assessment of interest on an award of backwages. See McClanahan v. Matthews, 440 F.2d 320, 324 (6th Cir. 1971). The court may, however, in the exercise of its inherent equitable powers, assess such interest against a violator of the Act.

The Government urges that employees victimized by sub-minimum wage payments

are entitled to an interest award, to make them whole for the defendant's wrongful withholding of moneys due the workers.

The award of interest falls within the court's discretion. A number of factors should inform the exercise of that discretion: the presence or absence of good faith on the employer's part, Hodgson v. American Can Co., 440 F.2d 916 (8th Cir. 1971); the magnitude of the violations, Marshall v. Burger King, 509 F. Supp. 353, 356 (E.D. N.Y. 1981); and perhaps the plausibility of the reasons for the violation, or when an employer runs afoul of a particularly complex regulation. See Marshall v. Duncan, 480 F. Supp. 62, 64 (E.D. Tenn. 1979). Assessment of interest, thus, involves an equitable analysis of the particular facts of each case. Clifton D. Mayhew, Inc. v. Wirtz, 413 F.2d 658, 663 (4th

Cir. 1969).

In the instant case, the court has already ruled that Glassboro's actions were not willful. Donovan v. Glassboro Service Association, Civil No. 78-0377, letter opinion, October 4, 1982 (Gerry, J.). The court's decision does not delineate exactly what an absence of willfulness means in the instant case, for it recognized the existence of three distinct definitions of willfulness. But the court held that, even under the least demanding standard -- knowledge of the likelihood of the application of the statute to the offensive conduct -- the record in this case did not suggest the presence of a willful violation:

> Whatever test this court applies, it would place a strained construction on the available record to find that Glassboro Services Association willfully violated the FLSA.
>
> The case presented a somewhat novel legal issue. More important,

> the question of liability for transportation (deductions) below the minimum wage was complicated in the instant case by the varying lengths of service of many of Glassboro's workers. It appears, for example, that the workers who finished out their contracts may not have suffered deductions for transportation expenses. See Affid. of Garafalo, para. 3, 4 (filed June 11, 1982), whereas other workers who did not work the full term of a contract did suffer such deductions.
>
> Moreover, the record suggests that Glassboro conducted the challenged practice over a substantial number of years, included in the contract a provision spelling out the transportation deductions and did not receive objection from one or another governmental entities which were familiar with the contract. Affid. of Garafalo, para. 5.

Id., letter opinion, October 4, 1982, p. 2.

The court's finding on the absence of willfulness represents an equitable factor counseling against the assessment of interest.

The record suggests another factor favorable to the employer -- Glassboro

and its members contracted with the Puerto Rican Government to provide free housing for the workers. The Act suggests that employers may legally deduct housing costs from the minimum wage payments to workers, under certain circumstances which the court held not present in the instant case. FLSA 3(m). Glassboro bargained away its right to take such deductions; therefore, the court held as a matter of law that the provision of free housing could not counterbalance illicit deductions for transportation costs. Nonetheless, the employer might reasonably have considered the provision of free housing as an offset against impermissible assessments against the wage.

Finally, Glassboro argues with some justification that the record strongly suggests that the Association did not have the use of a large part of the

moneys deducted for payment of transportation costs. That is, it appears that Glassboro expended such moneys to transport the workers. Therefore, at least in one light, it does not appear that Glassboro created a pool of money effectively 'loaned' to it by underpaid workers -- money which Glassboro might have used as capital, for example. Rather, the money covered transportation expenses.

The record does not thus present a compelling case for the assessment of interest. The court believes the equities recommend against such an award and so will decline to assess interest against Glassboro.

The court will enter the accompanying order.

/s/ John F. Gerry, U.S.D.J.

August 25, 1983 Order

U.S. District Court, District of N.J.

RAY MARSHALL, Secretary of Labor, Plaintiff,

v.

GLASSBORO SERVICE ASSOCIATION, INC., Defendant.

Civil Action No. 78-377

ORDER

This matter having come before the court upon the motion of the Department of Labor, Manuel Del Valle, Esquire, appearing; and

The parties having agreed to submit the matter upon the papers without

hearing or oral argument; and

The court having considered the submissions of the parties;

It is this 25th day of August, 1983, hereby ORDERED that:

1. Pursuant to the Consent Order In Re: Unpaid Minimum Backwages, Dec. 14, 1982, Paragraphs 2 and 3, defendant shall be liable for reductions of the minimum wage resulting from farmworkers' payment of bus fare transportation costs;

2. Defendants shall not be liable for interest upon the judgment in this case;

3. The total backwages for the 1980 and 1981 calendar years shall be, and hereby are determined to be, $88,807.67.

It is FURTHER ORDERED that, pursuant to the terms of this order and the terms of the consent order of Dec. 14, 1982, that final judgment for unpaid

minimum backwages shall be and hereby is entered against the defendant in the amount of $294,622.34.

/s/ JOHN F. GERRY, U.S.D.J.

July 23, 1987 Letter Opinion

U.S. District Court, District of N.J.

Upon Respondent's Second Motion to

Hold Petitioner in Contempt

U.S. District Court

District of N.J.

U.S. Court House

Camden, NJ 08101-0588

LETTER OPINION

Filed July 23, 1987

Patricia M. Rodenhausen, Esquire

Regional Solicitor

Leslie Paul Brody, Esquire

U.S. Department of Labor

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Millville, N.J. 08332

Re: William E. Brock, Secretary of Labor, U.S. Dept. of Labor vs. Glassboro Service Association, Inc.
Civil Action No. 78-0377

Dear Litigants:

Presently before the court is the plaintiff's application to hold the defendant in contempt. This matter is before the court more than four years following the entry of a judgment and final order. The case began with the filing of a complaint in June, 1978 charging defendant, a farm labor contractor, with violations of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. sect. 201 et seq. The pertinent factual background follows.

As part of its operations, defendant employs migrant farm workers

from Puerto Rico to work on its member farms. Defendant recruits many of its migrant employees in Puerto Rico and arranges their transportation from the Puerto Rican point of recruitment to the New Jersey point of hire. At the inception of this lawsuit, the defendant paid the transportation costs of its employees but then deducted those costs from the workers' paychecks. This deduction frequently resulted in reducing the workers' effective rate of pay to less then the minimum wage. (Workers who completed their contract period of work were later refunded the money deducted and given a return ticket to Puerto Rico.)

On December 4, 1979, we granted plaintiff's motion for partial summary judgment, (as to liability). Construing sect. 3(m) of the FLSA, 29 U.S.C. sect. 203(m), we found that the transportation

charges incurred by the employer "are to be considered primarily for the employer's benefit where such transportation is an incident of employment." (emphasis added). 29 C.F.R. sects. 531.2(d) and 531.32(C), see also Wage-Hour Administration Op. Letter #1139 (WH-92) December 10, 1970. Accordingly, we entered an order stating that,

> (1) Defendant shall not contrary to section 6 of the Act fail to pay its employees who are engaged in commerce or in the production of goods for commerce . . . at rates less than the minimum wage prescribed therein.
>
> (2) Defendant shall not deduct the cost of transporting workers from the point of recruitment to the point of hire from the minimum wages due its employees under the Act. Defendant shall not include in the computations of its employees' minimum wages, as the cost of furnishing facilities to its employees, the cost of transporting workers from the point of recruitment to the point of hire.

(We also barred the defendant from

taking an offset of workers' wages for the value of food and lodging provided the workers. This finding is not at issue presently.) We denied a motion for reconsideration February 2, 1980. The Third Circuit affirmed us without opinion October 18, 1980 (639 F.2d 774) and the Supreme Court denied certiorari April 6, 1981 (450 U.S. 1040).

In August, 1981, plaintiff brought an application to hold defendant in contempt. At the time defendant had stopped its practice of deducting transportation costs from workers' pay and was instead advancing the costs to the workers and then requesting "voluntary paybacks" of those advances. Plaintiff submitted evidence that the paybacks were not voluntary at all and the parties agreed to a Consent Amendatory Order to resolve the dispute. The order, entered November 5, 1981,

included verbatim paragraphs (1) and (2) of the December 4, 1979 order and added the following at paragraphs 4, 5, and 6:

> (4) Defendant shall not fail to comply with the provisions of 29 C.F.R. Part 531.35 which provides that "[w]hether in cash or in facilities, 'wages' cannot considered to have been paid by the employer unless they are paid finally and un conditionally or 'free and clear.' The wage requirements of the Act will not be met where the employee 'kicks-back' directly or indirectly to the employer or to another person for the employer's benefit the whole or part of the wage delivered to the employee. This is true whether the 'kick-back' is made in cash or in other than cash. . . ."
>
> (5) Defendant shall not advance transportation costs to its employees for transportation from their point of recruitment to their point of hire and then seek to secure a voluntary repayment, 'payback' or 'kick-back' to it by these employees where the result is to bring such employees below the minimum wage. . .
>
> (6) Defendant shall not apply any outstanding wage checks due to its employees to any transportation cost indebtedness where the result is to bring such employees below the minimum wage. . .

Shortly thereafter the parties also

entered a consent order regarding discovery, the purpose of which was the calculation of damages from the unlawful "voluntary paybacks." See Order of January 4, 1982.

The calculation of damages was, it seems clear from this record, a task of mortifying detail and scope. In the course of this calculation, which took over a year and a half, the government discovered another transportation cost which had been deducted from workers' wages. The defendant required its employees to pay the cost of inland bus transportation from the airport (typically Newark) to the farm labor camps. At times the workers paid bus fare before taking the trip from airport to farm, at other times paid upon disembarking the bus and at other times never paid at all. The cost of the trip for the last group of workers was then

deducted from their pay. Defendant conceded that deductions for bus fare assessed after the worker was assigned to a farm violated the November 5, 1981 consent decree. But defendant maintained that payments made before assignment to a particular farm did not violate the consent decree because the worker's payment is made before he begins working and thus cannot constitute a deduction of wages.

We rejected this argument flatly. Focusing on paragraph (2) of the consent order ("Defendant shall not include . . . the cost of transporting workers from the point of recruitment to the point of hire.") we held,

> Regardless of when the worker pays for his fare, the court thinks that the quoted portion of the consent order places the burden of that cost upon the employer. The decree forbids the employer from including transportation costs from the point of recruitment -- here Puerto Rico -- to the point of hire -- the farm -- as

> a part of the employer's minimum wage payment to the worker. But to pay workers the minimum wage, and at the same time to require them to pay their bus fare from the airport to the camp, effectively does render the cost of transport a part of the wage payment.

To hold otherwise, we stated, would "substitute[] artificial distinctions for a practical view of the economic realities of the worker-contractor relationship." Letter Opinion of August 25, 1983 at 3. We entered final judgment in the matter at that time, directing the defendant to pay some $294.000 in back wages.

Plaintiff's instant contempt application asserts that defendant continues to flout this court's orders through a contract provision which requires the migrants to pay their own transportation expenses. The provision provides, in relevant part:

Article 9 - Transportation

A. The Association shall arrange transportation for the worker from the point of departure in Puerto Rico to the work location. The worker shall be responsible for the actual cost of the air flight . . . (emphasis added).

The worker shall be responsible for the cost of inland transportation from the point of arrival on the mainland to the first living quarters . . . (emphasis added).

Defendant does not deny that this is the contract provision in force, since August of 1983, nor does it deny that by virtue of paying their own transportation the workers' wages are at times reduced to below the minimum wage. It contends that as a legal matter the court has not forbidden this transportation arrangement and that a contempt proceeding is an inappropriate mechanism for adjudicating its liability under this arrangement.

By way of remedy plaintiff seeks, in addition to an order barring the above-described practice, an order

mandating the payment of back-wages owed as a result of contempt from August 25, 1983 to the present.

Analysis

Before proceeding to an analysis of the contempt application itself, we must deal with one jurisdictional issue. In February of 1984, defendant sought protection form its creditors under Chapter 11 of The Bankruptcy Code. The filing of defendant's bankruptcy petition operated as an automatic stay of the commencing or continuing of other actions or proceedings not exempted from the stay against the debtor/defendant. Thus we reach the question of whether this petition must be stayed under the Bankruptcy Code, 11 U.S.C. sect. 362(a). We find that they stay does not affect the matter before us.

While the effect of the Bankruptcy Code's automatic stay is broad indeed,

the statute itself provides for exemptions from the stay. The instant application is so exempted. In particular, 11 U.S.C. sect. 362(5) provides in pertinent part:

> The filing of a petition under sects. 301, 302 or 303 of this title does not operate as a stay . . .
>
> (4) Under subsection (a) (1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;
>
> (5) Under subsection (a) (2) of this section, of the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power.

As the plaintiff correctly points out, there has generally been no stay of the enforcement of federal labor legislation. E.g. Ahrens Aircraft, Inc. v. NLRB, 703 F.2d 23, 24 (1st Cir. 1983) (automatic stay did not preclude enforcement of NLRB back pay order). Defendant does not

contest this and we thus find that this action is not stayed by the Bankruptcy Code.

We turn now to the merits of this application. Plaintiff's argument has two parts. First, he argues that the requirement that the migrant workers bear their air transportation costs constitutes contempt of this court's orders. Second, he asserts that the requirement that the migrant workers pay their own inland ground transportation costs constitutes contempt of this court's orders. We will address both arguments at once.

Plaintiff's argument as to both the air and ground transportation costs is simple. He asserts that while the form of the payments made by the workers has changed, the resulting effect is the same and is barred by this court's orders. For instance, plaintiff argues that this

payment by the workers is neither a "deduction" nor a "kick-back" however because the workers must pay their own transportation their wages are not paid "finally and unconditionally." Also, plaintiff notes that whenever and whomever the workers pay the costs of transportation those payments benefit the defendant, who depends upon the arrival of workers from Puerto Rico to provide farm labor. Finally, like the supposed "voluntary paybacks" we enjoined in 1981, these paybacks are not voluntary but are rather a condition of employment because workers who choose not to pay them simply do not work. Similarly, those who pay the transportation costs but choose to leave their jobs before completing their contracts do not get reimbursed for transportation.

Regarding the payment of inland transportation, plaintiff points out that

our August 25, 1983 letter opinion spoke to the legality of the workers paying bus fare before boarding the bus. We found that,

> Regardless of when the worker pays for his fare, the court thinks that the quoted portion of the consent order places the burden of that cost upon the employer. . . .
>
> . . . to pay workers the minimum wage, and at the same time to require them to pay their bus fare from the airport to the camp, effectively does render the cost of transport a part of the wage payment.

Letter Opinion at 3. Thus, plaintiff argues, as to the payment for ground transportation, this court's orders were crystal clear and the defendant's present activity constitutes contempt of those orders from the time of the opinions to the present.

Defendant has several responses. The most basic of these is the contention that neither this court nor the FLSA requires this defendant or any other

employer to pay the costs of its employees' transportation to the work site. For instance, defendant notes that a large fraction -- nearly 40% in 1986 -- of its workers simply show up at its farm labor camp. These workers sign a contract which does not include the transportation clause as to air fare from Puerto Rico or inland bus fare. (If these workers complete their contract, they are given air fare to return to Puerto Rico). Plaintiff has not argued that defendant must reimburse these people for their transportation costs; indeed, such people were specifically excluded from back pay calculations under this court's order of December 30, 1981. Counsel for defendant attests that he never believed this court prohibited workers from paying for their own transportation. (Jacob Affidavit at Paragraph 13). Thus, the issue of

whether a worker may pay his own transportation has not been before this court and must be litigated not in a contempt proceeding but a new lawsuit. Defendant requests, at the least, an opportunity to present evidence which will show inter alia, that the transportation from Puerto Rico to this country actually benefits not the employer but the worker, that the Commonwealth of Puerto Rico (which negotiates contracts on behalf of the migrant workers) considers the transportation to the mainland to be to the benefit of workers, and that even when defendant does not advance transportation costs to its workers it is able to hire an adequate number of workers.

On the issue of whether our 1983 letter opinion forbids the defendant's requiring its employees from paying their

own bus fare, defendant asserts that our opinion constitutes mere dicta on the present issue because no order encompassing the opinion was entered and because neither party contended that paragraph (2) of our 1981 amended order applied to the bus fare issue. Thus, defendant contends, even though we found that paragraph (2) did apply the basis for our decision was not properly before the court. (Brief at 2-3; Jacob Affidavit at Paragraph 18-20)

Finally, defendant asserts that it should not be held in contempt because it has attempted in good faith to comply with this court's orders. In February, 1984, defendant sought the Department of Labor's ("DOL") approval of a new arrangement regarding transportation costs. Defendant notes that the DOL did not respond to this proposal for more than a year and a half, finally rejecting

the proposal in October, 1985. In addition, defendant states that although the DOL knew that it (the defendant) had required its workers to pay their own transportation costs since at least 1982, the Department did not take the position that these payments violated this court's orders until March, 1986. Two weeks later the defendant requested a meeting between the parties to discuss and perhaps resolve the dispute (the meeting was held in April, 1986) but by letter of November 28, 1986 the DOL rejected defendant's offered solutions. (What those solutions were is not clear from the submissions.) The present application for contempt followed. In these circumstances, defendant argues that it tried in good faith to meet the requirements of our orders and should not be held in contempt for what it regards as the DOL's dilatory responses to its

proposals.

It appears best to begin our discussion with some general comments about our orders and the dictates of the FLSA. As defendant rightly argues the FLSA does not generally require that employers pay the transportation costs of their employees. However, the FLSA prohibits employers from including, in the wages paid to their employees, the cost of transportation or other "facilities" provided to the employees when those facilities are provided "for the benefit or convenience of the employer." 29 C.F.R. sect. 531.3(d)(1). In particular 29 C.F.R. sect. 531.32(c), promulgated to implement the provisions of the FLSA, provides:

> the cost of furnishing "facilities" which are primarily for the benefit or convenience of the employer will not be recognized as reasonable and may not therefore be included in computing wages. Items . . . which have been held to be primarily for the benefit

> of the employer . . . include . . . transportation charges where such transportation is an incident of and necessary to the employment . . .

In our 1979 grant of summary judgment as to liability we found, relying on the Wage and Hour Administration's Opinion Letter #1139 (WH-92) (December 10, 1970), that the costs of transportation from the point of recruitment to the point of hire (Puerto Rico to New Jersey) was part of the employer's recruitment cost and thus could not be considered part of the employee's wage.

Defendant's argument that we never forbade workers from paying their own fare misunderstands this basic finding. It is true that we did not require the defendant to reimburse the travel expenses of those workers who simply appeared at the labor camp ready to work. But as the defendant acknowledges those workers were never recruited.

Consequently, there was no recruitment cost for them; defendant never arranged transportation for these workers, who presumably came despite the lack of employer-arranged transportation. The situation of the workers the defendant now requires to pay their own bus and air fares is quite different. By the defendant's admission, these workers have been recruited. The contract itself states that the defendant "shall arrange transportation for the worker from the point of departure in Puerto Rico to the work location." Thus, the defendant continues to "furnish" transportation to the workers from Puerto Rico to New Jersey and must absorb the costs of recruitment because, as we found in 1979, those costs inure to the benefit of the employer and therefore cannot be place on the employee.

This was the gist of our finding in

August, 1983. Then, as now, defendant argued that when a worker pays his own transportation costs the FLSA, the applicable regulations, and our orders do not apply because each of those speaks of prohibiting "deductions" from wages or "set-offs" in "computing" wages to pay transportation costs. We rejected that argument in 1983 because "it substitutes artificial distinctions for a practical view of the economic realities of the worker-contractor relationship." We find now, as we did then, that when the defendant recruits employees in Puerto Rico and arranges transportation for them to the United States, the cost of that transportation must be borne by the defendant.

We find unavailing defendant's argument that our letter opinion of August, 1983 was mere dicta because we entered no order specifically and

explicitly prohibiting workers from paying their bus fare. The opinion made clear that the 1981 consent order already prohibited that practice. After quoting paragraph (2) of our order we stated,

> Regardless of when the worker pays his fare, the court thinks that the quoted portion of the consent order places the burden of that cost on the employer. (emphasis added).

Thus, the meaning of the consent order could not have been clearer, as to the bus fare.

The meaning of our orders regarding payment for air fare is not so clear. It is true that the issue of whether defendant may prohibit workers from paying their own air fare has not been squarely before this court. Still, we reject the defendant's argument that because this court has not specifically enjoined the recruited workers from paying their own air fares this petition should be dismissed. In McComb v.

Jacksonville Paper Co., 336 U.S. 187, 192 (1949), the Supreme Court flatly rejected arguments quite similar to that defendant asserts. There defendant had been enjoined, under the FLSa, from failing to pay its employees less than the minimum wage, from failing to pay time and a half for overtime, and from failing to keep records of its employees' hours. On the contempt application defendant asserted that it could not be held in contempt because its actions had not violated the letter of the court's order and thus could not be deemed "willful." The Supreme Court held that prosecution for contempt did not require a showing of wilfulness. 336 U.S. at 191. In particular, the High Court noted that when a litigant has specifically been enjoined from violating the provisions of the FLSA he must apply to the issuing court for modification, clarification or

construction of the order if the decree is too burdensome. Failing this, the party acts at its peril. Id. at 192. As Justice Douglas stated,

> It does not lie in their mouths to say that they have an immunity from civil contempt because the plan or scheme which they adopted was not specifically enjoined. . . . They took a calculated risk when under the threat of contempt they adopted measures designed to avoid the legal consequences of the Act.

In the instant matter this court, like the court in McComb, entered an order generally barring the defendant from violating the provisions of the FLSA. See orders of December 4, 1979 and November 5, 1981 at Paragraph 1. Thus, it was the defendant's obligation to apply to the court for modification or clarification of the order when defendant found our order burdensome. This avenue was open to defendant throughout the three and a half years since we entered final judgment in this case. Certainly

defendant had plenty of indication that such an application was appropriate. By defendant's counsel's own admission, "my clients and I were stunned when the court determined (in August, 1983) that the bus fare arrangement violated paragraph two of the Consent Amendatory Order." (Jacob Affidavit at Paragraph 20). In addition, the DOL's repeated rejections of defendant's proposals (because the DOL believed the proposals violated this court's orders) might have moved defendant to seek modification or clarification. Instead, like the defendant McComb, defendant chose to put its own interpretations on our orders and on the requirements of the Act and only now, facing prosecution for contempt, urges its interpretations upon us.

Further, it is no defense to contempt to say that the DOL has been dilatory in its responses to defendant's

proposals. If defendant believed the DOL was wrong in its interpretations of our orders, it should have sought appropriate clarification. Certainly defendant had reason to do so at least one year ago when the DOL made clear its opposition to the workers bearing the costs of their transportation. More importantly, defendant was under the orders of this court to stop all violations of the FLSA. This obligation does not depend upon the DOL's timely response to defendant's proposals.

For the reasons stated above we find that the defendant has been in contempt of this court's orders from August 25, 1983, the entry of final judgment in this matter, to the present time. This court will enter an order requiring the defendant to conduct a self-audit of its records, under the supervision of the United States

Department of Labor, and compute all back minimum wages and interest on those wages due to its employees from August 25, 1983 to the present. This order will also require the defendant to stop its practice of requiring and/or permitting its recruited employees to pay their transportation costs as a direct or indirect consequence or condition of employment.

Very truly yours,

/s/ John F. Gerry, U.S.D.J.

JFG/rmk

September 8, 1987 Notice of Appeal from Decision of United States District Court for District of New Jersey dated July 23, 1987 to United States Court of Appeals for the Third Circuit

WILLIAM E. BROCK, Secretary of Labor, United States Department of Labor,
Plaintiff,

vs.

GLASSBORO SERVICE ASSOCIATION, INC.
Defendant

Civil Action

File No. 78-0377

(Gerry, J.)

NOTICE OF APPEAL

TO: CLERK, U.S. DISTRICT COURT
U.S. Court House and P.O. Bldg.
Camden, New Jersey 08101

HONORABLE JOHN F. GERRY
U.S. Court House and P.O. Bldg.
Camden, New Jersey 08101

PATRICIA M. RODENHAUSEN
Regional Solicitor
U.S. Department of Labor
1515 Broadway
New York, New York 10036

SIRS: PLEASE TAKE NOTICE that Frederick A. Jacob, Esquire hereby appeals to the United States Court of Appeals for the Third Circuit from a decision dated and filed July 23, 1987 holding defendant, Glassboro Service Association, Inc., in civil contempt of Court. The Order incorporating the above decision was signed by Judge Gerry on July 23, 1987 and filed on the same date.

PLEASE TAKE FURTHER NOTICE that the applicant will rely upon the transcript of the April 30, 1987 oral argument before Judge Gerry of the States District Court of New Jersey. Copies of the transcripts of that hearing have been duly ordered by the undersigned.

PLEASE TAKE FURTHER NOTICE that request is also made for oral argument to be held concerning this appeal.

/s/ Frederick A. Jacob

February 8, 1988 Judgment Order of United States Court Appeals for the Third Circuit

WILLIAM E. BROCK, Secretary of Labor, United States Department of Labor,
Plaintiff,

vs.

GLASSBORO SERVICE ASSOCIATION, INC.
Defendant.

Civil Action

File No. 78-0377

(Gerry, J.)

ORDER

WHEREAS on December 4, 1979, this Court signed an Order granting partial summary judgment permanently enjoining defendant from violating sections 6 and 15(a)(2) of the Fair Labor Standards Act of 1938, as amended, 29 USC 201 et seq, (F.L.S.A.);

WHEREAS on November 4, 1981, this Court signed a Consent Amendatory Order amending and further refining its previous Order granting partial summary

judgment permanently enjoining defendant from violating the FLSA;

WHEREAS on August 25, 1983, this Court signed a Letter Opinion clarifying in all aspects its prior Judgment and Order permanently enjoining defendant from violating the FLSA;

WHEREAS this proceeding having come before the court on Plaintiff's Motion to Hold defendant in Civil Contempt, the court being fully advised of the issues and having rendered its decision herein following oral argument on April 30, 1987;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that defendant is in civil contempt of the Judgment, Order and Letter Opinion previously entered in this matter; and it is further

ORDERED, ADJUDGED AND DECREED that defendant shall have five (5) days from the date of this Order to purge itself of

its contempt of this Court's prior Judgment, Order and Letter Opinion by ensuring that all employees receive the appropriate minimum wage under the FLSA and that recruited employees are neither required nor permitted to pay either their air fare or bus fare as a direct or indirect consequence or condition of employment to the extent such transportation payments would reduce their wages below the minimum wage; and it is further

ORDERED, ADJUDGED AND DECREED that plaintiff's Motion to withdraw its FLSA contempt proceeding from Bankruptcy Court to the District Court is hereby granted; and it is further

ORDERED, ADJUDGED AND DECREED that within five (5) days from the date of this Order, defendant shall conduct a self-audit of its records, under the supervision of the U.S. Department of

Labor, and compute all minimum wages due to it's employees, from August 25, 1983 to the present; and it is further

ORDERED, ADJUDGED AND DECREED that following completion of its self-audit, defendant shall provide all payroll and employment records, to plaintiff's representatives which are necessary for plaintiff to compute all post-bankruptcy petition interest due to employees found by the court to be due minimum wage compensation; and it is further

ORDERED, ADJUDGED AND DECREED that in the event defendant does not purge its contempt in the time and manner described in this Order, plaintiff may apply for an Order directing such remedial or other sanctions against defendant as may be appropriate to compel defendant to purge the aforesaid contempt.

/s/ Honorable John F. Gerry

Dated: July 23, 1987

November 22, 1983 Consent Order, United States District Court, District of New Jersey

Ann McLaughlin, Secretary of Labor, United States Department of Labor,
Plaintiff,
vs.
Glassboro Service Association, Inc.
Defendant

Civil Action File No. 78-0377

Consent Order

WHEREAS on July 23, 1987, this Court signed an Order adjudging that defendant is in civil contempt of the Judgment, Order and Letter Opinions previously entered in this matter; and

WHEREAS on November 24, 1987, the Court signed a Consent Order which Ordered, inter alia, that the defendant shall conduct an audit of the records of all workers employed by the defendant's member - growers from August 25, 1983 through the date when the defendant came into compliance with the minimum wage provisions of the Fair Labor Standards

Act; and

WHEREAS defendant has completed and forwarded said audit to the plaintiff's attorney;

It is hereby ORDERED, ADJUDGED AND DECREED that the defendant is restrained from further withholding the following amounts of unpaid minimum wages due the employees listed in Exhibit 4A for each of the years listed.

1983	$53,832.74
1984	51,082.29
1985	59,153.60
1986	53,172.72
GRAND TOTAL	$217,241.35

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that statutory interest computed on the Post-Bankruptcy Petition principal amount will be submitted to the Court as a Supplemental Order within sixty (60) days.

SO ORDERED:

/s/JOHN F. GERRY
United States District Judge

In hereby consent to the
form and content of the above Order.

George R. Salem
Solicitor of Labor

Patricia M. Rodenhausen
Regional Solicitor

By: /s/Theodore T. Gotsch
Counsel for Employment Standards
U.S. Department of Labor
Attorneys for Plaintiff

/s/Frederick A. Jacob, Esq.
Attorney for Defendant